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Jeffrey bin Tahil v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05(H)-459–10 OF 2019
KAMARDIN HASHIM, RHODZARIAH BUJANG AND MOHAMAD ZABIDIN JJCA
24 JANUARY 2020

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Criminal Law — Murder — Grave and sudden provocation — Sudden fight — Whether accused's defences failed as evidence showed he had come prepared to attack deceased while armed with a knife — Whether accused's act was not only premeditated but he had also behaved in a cruel manner by continuing to attack deceased even after the latter had fallen to the ground

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The instant appeal was against the appellant's conviction for murder. He had caused a man's death by stabbing him with a knife in the showroom of a company where the appellant worked as a security guard while the deceased worked as a salesman. The appellant had stabbed the deceased several times with the knife, taken from the company's workshop, but the fatal blow was the one that pierced the heart. Eye-witnesses testified that the attack followed a heated argument and grappling between the two men and that even after the deceased fell to the floor the appellant continued with his assault and even attempted to hit the deceased with a piece of pipe as the deceased was being taken away from the scene. The appellant contended that the incident was caused by the deceased's constant provocation, ie, in making insulting and derogatory remarks of the appellant and his family by referring to them as 'Pala'u', which described a nomadic tribe of sea gypsies who lived in boats in the seas off Sabah and whom Sabahans generally regarded as illegal immigrants, uneducated and backward and whose women and children usually begged on the streets for a living. The trial judge rejected the defences of 'sudden fight' and 'grave and sudden provocation' on finding that: (a) although a sudden fight did take place between the appellant and the deceased, there was premeditation on the appellant's part as on the fateful day he had been searching for the deceased right after reporting for work while armed with the knife; and (b) the insults from the deceased were not sudden but had been going on for about a month before the incident and the appellant had previously not lost his self-control.

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Held, unanimously dismissing the appeal and affirming the trial court's decision:

(1) Although the continuous taunts and insults and use of derogatory words by the deceased had provoked the appellant to anger, the defence of

'cumulative provocation' did not exist in our criminal law, but only grave and sudden provocation. That defence was rightly rejected by the trial judge because even though the provocation was grave, it was definitely not sudden (see para 20).

(2) As for the defence of sudden fight, the trial judge rightly found that this was not raised with the prosecution witnesses especially the manager of the company ('PW6') (who was the first person to have witnessed the quarrel between the two men) and the investigating officer ('PW10'), who were in the best position to verify the probability of the same (see para 21).

(3) Even if the police report of the eye-witness, PW6, alluded to a fight having taken place between the appellant and the deceased, in order for the defence of sudden fight to be sustained, the defence had to show that the fight was not only sudden but that there was no premeditation; that the fatal act was committed in the heat of passion and that the appellant had not taken undue advantage or acted in a cruel or unusual manner. That burden was not discharged by the appellant in this case as there was premeditation on his part. The appellant simply had no reason to be looking for the deceased that day while armed with a knife. His seething anger and ill-feelings towards the deceased justified the conclusion that his act was a premeditated one. Furthermore, as per PW6's evidence, the appellant had acted in a cruel manner for he had continued to attack the deceased even after the latter had fallen to the ground (see paras 22–23).

[Bahasa Malaysia summary

Rayuan telah dikemukakan terhadap sabitan atas kesalahan membunuh terhadap perayu. Dia telah menyebabkan kematian seorang lelaki dengan menikamnya menggunakan pisau di dalam bilik pameran sebuah syarikat di mana perayu bekerja sebagai pengawal keselamatan sementara si mati bekerja sebagai jurujual. Perayu telah menikam si mati beberapa kali menggunakan pisau yang di ambil daripada bengkel syarikat tersebut, namun tindakan yang mengakibatkan maut adalah tikaman pada jantung si mati. Saksi di tempat kejadian menerangkan bahawa serangan tersebut berlaku setelah perbalahan hangat dan pergelutan antara dua lelaki tersebut dan walaupun selepas si mati telah jatuh ke atas lantai, perayu masih memukul dan masih mencuba untuk memukulnya menggunakan sebatang paip walaupun si mati sedang di bawa pergi dari tempat pergaduhan. Perayu berhujah bahawa insiden berlaku disebabkan sering diprovokasi oleh si mati, iaitu dengan menghina dan kata-kata penghinaan terhadap perayu dan keluarganya dengan memanggil mereka sebagai 'Pala'u', yang bermaksud kaum gipsi laut yang hidup secara nomad yang tinggal di atas bot di perairan Sabah yang secara am, digelar oleh orang Sabah sebagai pendatang yang tidak sah, tidak berpelajaran dan ketinggalan yang kaum wanita dan anak-anaknya selalui meminta sedekah di atas jalan-jalan raya untuk meneruskan kehidupan. Hakim bicara menolak

pembelaan 'bergaduh secara tiba-tiba' dan 'provokasi yang serius dan tiba-tiba' berdasarkan: (a) walaupun pergaduhan tiba-tiba telah berlaku di antara perayu dan si mati, terdapat perancangan di bahagian perayu kerana pada hari kejadian, perayu telah mencari si mati selepas melaporkan diri di tempat kerja dan membawa pisau; dan (b) penghinaan daripada si mati adalah bukan secara tiba-tiba dan telah berlarutan dalam masa sebulan sebelum kejadian dan perayu tidak hilang kawalan diri sebelum ini.

Diputuskan, secara sebulat suara menolak rayuan dan mengesahkan keputusan mahkamah perbicaraan:

(1) Walaupun ejekan dan kutukan telah berlarutan dan pengunaan kata-kata penghinaan oleh si mati telah memberi provokasi kepada perayu untuk marah, pembelaan 'provokasi secara kumulatif' tidak wujud di dalam undang-undang jenayah di sini, dan hanyalah merangkumi provokasi secara serius dan tiba-tiba. Pembelaan tersebut adalah dengan tepat ditolak oleh hakim perbicaraan kerana walaupun provokasi adalah serius, namun ia adalah bukan secara tiba-tiba (lihat perenggan 20).

(2) Untuk pembelaan pergaduhan secara tiba-tiba, hakim perbicaraan telah dengan tepat mendapati bahawa ini tidak dibangkitkan menerusi saksi pendakwaan yang merupakan pengurus syarikat tersebut ('PW6') (yang merupakan orang pertama yang telah menyaksikan pergaduhan antara dua lelaki tersebut) dan pegawai penyiasat ('PW10'), yang merupakan orang yang diposisi paling sesuai untuk mengesahkan kebarangkalian perkara tersebut (lihat perenggan 21).

(3) Walaupun laporan polis atau saksi kejadian, PW6, menyatakan pergaduhan telah berlaku di antara perayu dan si mati, untuk menggunakan pembelaan pergaduhan secara tiba-tiba, pembelaan tersebut haruslah menunjukkan pergaduhan itu bukanlah sahaja tiba-tiba namun tiada perancangan; perbuatan yang telah menyebabkan kematian dilakukan di dalam 'heat of passion' dan perayu tidak menggunakan kelebihan yang tidak wajar atau bertindak dengan kejam atau secara luar biasa. Beban tersebut tidak dibukti oleh perayu di dalam kes ini akibat terdapat perancangan olehnya. Perayu tidak langsung mempunyai sebab untuk mencari si mati pada hari kejadian sambil bersenjatakan pisau. Kemarahan dan perasaan tidak puas hati terhadap si mati memberi kesimpulan bahawa tindakannya itu adalah sesuatu yang sudah dirancang. Selanjutnya, berdasarkan keterangan PW6, perayu telah bertindak dengan kejam kerana dia terus menyerang si mati walaupun setelah si mati jatuh ke lantai (lihat perenggan 22–23).]

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
PP v Surbir Gole [2017] 1 MLJ 549, FC (refd)

A *Tan Kim Ho & Anor v PP* [2009] 3 MLJ 151; [2009] 3 CLJ 236, FC (refd)

Legislation referred to

Penal Code s 300, Exception 4

B **Appeal from**: Criminal Trial No TWU-45–9/8 of 2013 (High Court, Tawau)

Abdul Gani bin Zelika (Johari, Zelika & Amin) for the appellant.
Muhammad Azmi Mashud (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

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Rhodzariah Bujang JCA (delivering judgment of the court):

[1] The appellant was charged with and convicted of the murder of his own colleague at Tan Chong Industrial Equipment (Sabah) Sdn Bhd ('the company') which offence was committed at the showroom of the company. The appellant was a security guard employed by the company whereas the deceased was its salesman. The charge against the appellant reads as follows:

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> Bahawa kamu, pada 13hb. Mac 2012, jam lebih kurang 4.50 petang, bertempat di Showroom 1D Tan Chong Industrial Equipment (Sabah Sdn Bhd) Batu 3 ½ Jalan Apas, di dalam daerah Tawau, di dalam Negeri Sabah, dengan sengaja telah menyebabkan kematian kepada seorang penama ABDUL LASAH BIN SAMBAWA L/38 thn Bajau, Mykad 731214-12-5335, oleh itu kamu telah melakukan kesalahan yang boleh dihukum di bawah Sek. 302 Kanun Keseksaan.

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[2] The appellant's appeal against the said decision was heard and dismissed by us on the 26 November 2019. Our reasons for doing so are set out below but first we would lay out a summary of both the respective case for the prosecution and the defence.

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THE PROSECUTION CASE

[3] At the outset we must point out that the evidence as adduced by the prosecution was largely undisputed for the main thrust of the appeal before us was the defence of the appellant. Thus, we have taken the liberty to condense the said evidence below.

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[4] Firstly, it was not disputed that as certified by Dr Jessie Hiu ('PW1'), the pathologist from Queen Elizabeth Hospital, Kota Kinabalu, the deceased died of hypovolemic shock due to or as a consequence of a stab wound on his chest and aside from that injury he suffered sixteen others as listed in PW1's post mortem report at pp 31–32, Vol 3 of the appeal record. These include two other stab wounds, one also on the chest and the last one on the back of the left arm but the rest of the injuries were largely abrasive wounds, such as scratches

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and bruises. According to PW1's evidence, the said abrasive wounds were probably caused by the tip of a sharp object and also when the deceased fell on the ground. She said the weapon used to inflict the fatal stab wound and the other injuries was a knife like the one ('exh P12(a)') shown to her by ASP Ridzuan Bin Khalid ('PW10') during the post mortem. PW1 in her evidence also said that the fatal injury described by her would 'in the ordinary cause of nature can cause death to the deceased' (sic). That knife was identified by the manager of the company, Lee Chuk Piu ('PW6') as the one used by the appellant to stab the deceased. This he was able to say because he was the first to witness the quarrel between the appellant and the deceased which he failed to stop. PW6's evidence on this as well as an apprentice mechanic, Sahrill bin Sahrudin ('PW5') and Muliyadi bin Manti ('PW7'), also a mechanic in the company who both came to the scene after PW6, have been neatly summarised by the learned judicial commissioner ('JC') as His Lordship then was, at pp 15–16 of the appeal record Vol 1. The gist of it is that both PW6 and PW5 saw the appellant stabbing the deceased whilst PW7, who came later than them, identified the said knife which he found beside the deceased who was lying in pain on the floor and which PW7 then threw away. That knife said PW7 was from the company's workshop. The importance of PW7's evidence also is that just prior to the incident, the appellant had walked pass him and asked whether he had seen the deceased. He replied in the negative but suggested that the deceased might be in the showroom and not long after that the fight between the two started. The appellant's merciless attack on the unarmed deceased, according to PW6, also continued after he had fallen on the floor and PW7 also testified that even whilst he was bringing the then injured deceased out of the workshop after the appellant had been restrained from further attacking the deceased, the appellant again took a piece of pipe to hit the deceased but was stopped by PW5. As noted by the learned JC and confirmed by our examination of the notes of proceedings, the evidence of these three witnesses were not seriously challenged by the defence and His Lordship was therefore confident that their evidence was credible.

[5] Based on the aforesaid evidence, the learned JC found that a prima facie case has been made out against the appellant, and as held His Lordship at p 17 of the appeal record Vol 1:

> These evidence, in my view, shows that the act of the Accused was deliberate and there is a close nexus between the acts of the Accused and the injury number 11 which went through the deceased's heart.
>
> Based on the aforesaid, I am of the opinion that the act of the Accused falls under paragraph (c) of Section 300.

A THE DEFENCE

[6] The appellant elected to give sworn evidence. Similarly that evidence of his has been neatly summarised by the learned JC at pp 18–20 of the same Volume and given that the issues on the defence raised before us were largely legal and not factual, we would again just mention the gist of it in our judgment, which is that the deceased had been insulting the appellant by calling him and even his wife and children 'Pala'u' and telling him that 'Pala'u tidak ada ugama'. These insults started after he refused to punch in the latter's attendance card as requested by the deceased and culminated on the day of the incident with the following exchange of words as stated by the learned JC at p 19 and which we would now reproduce below:

> On that fateful day after punching his card the Accused went into the showroom and saw the deceased there. He claimed that the deceased said:
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> > Hoi Pak Chik Palahu, saya dengar kelmarin ada penangkapan di Batu 4 di Imigresen sana ada pemeriksaan Imigresen di Batu 4. Kena tangkap anak-anak mu sama bini mu itu, pasal IC anak-anak mu to projek-projek. Nanti saya bagi tahu Imigresen suruh tangkap anak mu.
>
> According to the Accused it was then he replied to the insult by saying:
>
> > Lasah, jangan kau hina anak bini saya, pasal anak bini saya itu lahir di sini orang-orang di sini'.
>
> The Accused continued:
>
> > Kau ini Sulukkah, kalau Suluk itu mundu sama lanun-lanun. Itulah aku bilang anak bini kau itu serupa mundu lanun-lanun.
>
> The Accused then proceeded to the van stationed in the showroom and it was at this point that he heard footsteps from behind and heard the deceased said:
>
> > En Pak Cik Pelahu kenapa kau hina aku begitu, kau pun Pelahu.

[7] The appellant claimed that thereafter the two of them grappled and hit each other and he also admitted that he hit the deceased with the knife which he took from the workshop earlier to cut the grass. This the appellant did because he claimed that besides being a security guard he was also asked to do gardening work by the company.

[8] It is now timely and appropriate for us to explain the reason why the appellant took such great offense at the 'Pala'u' word used against him. It is because of its derogatory meaning to a Sabahan and the learned JC had considered this in His Lordship's judgment at pp 20–22 of the same Volume as follows:

20. It is perhaps appropriate for me at this juncture to pause and make some observation concerning the alleged insulting words uttered by the deceased. The term Bajau Pala'u refers to a nomadic tribe of sea gypsies found living in boats in the sea off Semporna, Sabah. In his submission learned counsel states:

> the provocative words used against the Accused is Pala'u a community of sea gypsies due to their nomadic lifestyle in the seas and majority of them are considered illegal immigrants who still live on boats. Amongst Sabahan the Pala'u women and children are also notorious as street beggers.

21. I have no hesitation to adopt the description of the word 'Pala'u' made by learned counsel in his submission. It reflects the true perception of the general public in Sabah with regards to the Pala'u community. If I may add, generally speaking the Pala'u community is always been referred to as uneducated, backward and marginalized community.

22. Hence I agree with learned counsel that the word Pala'u purportedly used by the deceased is both insulting and derogatory of the Accused.

[9] Coming back to the judgment of the learned JC, His Lordship noted that the defence raised was one of sudden fight but which was not put to the prosecution witnesses but instead the defence suggested to the investigating officer, ASP Ridzuan bin Khalid ('PW10') that it was grave and sudden provocation. That evidence at p 156 of Vol 2 of the Appeal Record is as follows:

> Q Merujuk kepada siasatan keseluruhan kamu untuk kes ini setujukah kamu sekiranya saya katakan bahawa terdapat kemungkinan mangsa telah mengucapkan perkataan-perkataan yang telah membangkitkan kemarahan tertuduh sebelum berlakunya pergelutan tersebut?
>
> A: Ya.

[10] Then at p 157 of the same Volume, it was put to the witness as follows:

> Q: Merujuk kepada hasil siasatan kamu setujukah kamu sekiranya saya katakan bahawa semasa bergelut tertuduh secara tidak sengaja telah tertikam bahagian dada mangsa?
>
> DPP: I object.
>
> Court: I take note this is a put question.
>
> A: Tidak setuju.

[11] Nevertheless, the learned JC then proceeded to consider the elements of the defence of a sudden fight which is Exception 4 to s 300 of the Penal Code to wit:

(a) the fight must be sudden;

(b) there must be no premeditation;

(c) the fatal act must be committed in the heat of passion; and

A (d) the offender must not take undue advantage or act in a cruel or unusual manner.

[12] The learned JC then made a finding that there was indeed a sudden fight between the two.

B In this case the possibility of a sudden fight could not be ruled out. Having to endure the insult from the deceased for quite sometime until immediately before the fight, when the deceased made certain remarks regarding the arrest of the Accused's wife and children, this final insult could have prompted the Accused to respond. However upon aggressive reaction from the deceased a fight ensued where C the Accused had stabbed the deceased. Thereafter the Accused seem to have lost control of himself only to realize later that he had stabbed the deceased on his chest.

His testimony is consistent with the evidence of PW6 who testified that he heard footsteps of someone walking quite fast in the showroom before he heard the two of them quarrelling. I would also observe that the quarrel started not long after the D Accused entered the showroom and when he heard the loud footsteps. Considering these evidence in its totality, I am of the opinion that there was a sudden fight between the accused and the deceased in the showroom on that fateful day.

[13] However, having considered the evidence of the animosity between the E appellant and the deceased, the appellant's search for the deceased shortly before the incident and right after reporting for work as well as carrying the said knife which was taken from the workshop, His Lordship found that the appellant '… was prepared for any eventualities when he met the deceased'. His Lordship rejected the reason given by the appellant why he carried the knife, F that is to cut the grass because, inter alia, PW6 was never cross-examined by the defence that gardening was part of his job scope as a security guard and it was unreasonable to use a knife to do that and not a grass cutter. Therefore, the learned JC concluded that the appellant's act was a premeditated one and that he had acted in a cruel manner for he not only confronted the unarmed G deceased with the knife but stabbed him at his vital organ. Thus, said His Lordship, the defence of sudden fight was not proven on a balance of probability.

[14] Alternatively, the learned JC also considered the defence of grave and H sudden provocation which His Lordship also rejected because firstly, mere quarrelling was insufficient to show provocation in the absence of evidence of the words uttered before the scuffle took place. Secondly, the insults from the deceased had been going on continuously for at least a month and the appellant was patient then. A reasonable man would not lose self-control because there I was sufficient time to cool down, reasoned His Lordship further before concluding as follows:

In my opinion the evidence show that the feel of anger has been building up within the Accused which prompted him to look for the deceased on that particular day. At this stage the Accused's act was a premeditated one and the fact that he brought the

knife with him shows that he was prepared for any eventualities. In the circumstances I am of the opinion that the defence of sudden and grave provocation is not applicable to the Accused.

THE APPEAL

[15] The two issues raised before us can be condensed into one which is the failure to consider that the defence of both sudden fight and grave and sudden provocation had been proven by the appellant. Learned counsel for the appellant submitted that the learned JC was wrong to hold that the defence had failed to put the appellant's defence of sudden fight to the prosecution witnesses because this has been disclosed in the police report of PW6 (exh P18) who said in the said report that he heard the commotion between the two of them before witnessing them grappling with each other. Citing the Federal Court in *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209, he submitted that such failure does not '... relieve the prosecution of its duty of establishing the charge against the accused beyond any reasonable doubt'.

[16] As for the other defence, learned counsel referred to the evidence of PW7 which he said was not considered by His Lordship and which shows that he was his normal self then and was only gravely provoked later by the deceased. This evidence at p 80, lines 1–4 of Vol 2 of the appeal records reads:

Q: Tadi kamu ada cerita si Jeffrey lalu belakang kamu dan bertanya kamu ada nampakkah si Lasah. Waktu dia menanya macamana nada suaranya?

A: Suara dia biasa sahaja.

[17] Equally, there was failure on His Lordship's part, submitted learned counsel further, to consider the evidence of the defence witness, Zulkarnain bin Ramlee ('DW2') who was an assistant storekeeper of the company and whose evidence at pp 212–213 and 215 of the appeal record Vol 2 as highlighted by learned counsel reads as follows:

Q : Sepanjang kamu kenal Jefri waktu bekerja di sana, apa kerja-kerja yang dia buat?

A: Dia jaga premis, kadang-kadang dia kasi bersih keliling-keliling pagar, rumput, itu saja.

Q: Seingat kamu, kamu pernah nampak dia kasi bersih rumput keliling pagar guna apa?

A: Tidak berapa pasti, saya pernah nampak dia pakai gunting, guna pisau untuk potong rumput.

Q: Jadi kamu memang pernah nampak Jefri bersihkan rumput guna gunting dan pisau?

A: Pernah nampak.

...

A Q: Jadi tentang si Jefri tugasnya memotong rumput, semua di Tan Chong pun tahu dia buat begitu?

A: Ya, sebelum ini security yang dulu pun begitu juga.

B **[18]** The defence had been proven because, submitted counsel for the appellant, his client had been degraded continuously by the deceased from the first month he started working with the company on account of his race (Bajau) and calling not only him but his wife and children 'Pala'u'.

C GRAVE AND SUDDEN PROVOCATION

[19] We would start our consideration of this last defence first by referring to the Federal Court's decision in *Public Prosecutor v Surbir Gole* [2017] 1 MLJ 549 which made the legal position clear at paras 33–39 of the judgment as
D follows:

[33] In the case of *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251; [1988] 1 CLJ 143; [1988] 1 CLJ Rep 162, referred to by the Federal Court in *Che Omar*'s case, Seah SCJ, in delivering the judgment of the Supreme Court said:

E > The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control (see *Nanavati v State of Maharashtra AIR* [1962] SC 605, 530).

F [34] It appears to us that the term 'cumulative provocation' used or referred to in the High Court and the Court of Appeal in this case, and the cases referred to or cited in both courts, was used in relation to a series of provocations each of which is not by itself grave. It is only when all the provocations in the series are accumulated that the sum total of them becomes grave provocation.

G [35] We believe that *Che Omar*'s case has made the legal position clear with regard to cumulative provocation of the nature described in para 34 above. We ought to be reminded that the defence of 'cumulative provocation' does not exist in our criminal law, and therefore we are not persuaded that it is a permissible defence to s 300 of the Penal Code. Only the defence of grave and sudden provocation is specifically provided for in Exception 1 to s 300 in the Penal Code. We are not incline to agree to any departure from the established law.

H [36] We wish to reiterate, however, that provocation to an accused person that is ordinarily and by itself not grave may be grave enough to fall within Exception 1 to s 300 when, after all the circumstances of the case before and during that provocation are taken into consideration, it can be concluded that 'a reasonable man, belonging to the same class of society as the accused, placed in the situation in
I which the accused was placed would be so provoked as to lose his self-control'.

[37] To be able to come within Exception 1, the provocation that an accused person is relying on must not only be grave, but must also be so sudden as to cause the accused person to 'lose his self-control', and act in spontaneous reaction to the grave provocation.

[38] It is the kind of suddenness that, to use the words in the illustrations to Exception 1 to s 300 of the Penal Code, 'excited ' the accused person to 'sudden and violent passion' or to 'violent rage'.

[39] Ultimately, however, whether the provocation is grave and sudden is a question of fact. (Emphasis added.)

[20] Applying the said principle to the facts of this case, even though we totally agree with the appellant's counsel that the continuous tauntings of the deceased by the use of the derogatory word 'Pala'u' by the deceased was very insulting and which understandably incited such feelings of anger in the appellant, but as held by the Federal Court in the cited case, the defence of 'cumulative provocation' does not exist in our criminal law — only grave and sudden provocation. That defence was therefore rightly rejected by the learned JC because even though the provocation was grave, it was definitely not sudden.

[21] As for the defence of sudden fight, as rightly found by the learned JC and submitted by the learned DPP, this was not raised with the prosecution witnesses especially PW6 and the investigating officer, ASP Ridzuan bin Khalid ('PW10') who were in the best position to verify the probability of the same, in particular the latter as he was the first person who heard their altercation. The law on the effect of such a failure or omission has been made clear by the Federal Court in *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151 at p 165; [2009] 3 CLJ 236 at p 253 as follows:

[33] In our adversarial system of justice, the duty of each party is to show that his case is the truth. This is done by him adducing his own witnesses to support his contention. When it is the plaintiff or prosecutor who is adducing the evidence, his witnesses are subject to cross-examination by the defence or the accused person. When a prosecution witness makes a statement of fact which is disagreed to by the defence it becomes the defence's duty to, in whatever way, put to the plaintiff or prosecution witness that what the witness has said is not true. In addition, he could also use the plaintiff's or prosecution's witnesses to adduce evidence to support his defence and to indicate what his defence is. This he is required to do to enable the plaintiff or prosecution to bring out evidence to disprove what the defence intends to adduce. If the defence does not in any way indicate by cross-examination of those facts, those statements made by the plaintiff's or prosecution's witnesses must be accepted as true. *Even if the plaintiff's or prosecution's witness does not say anything relating to the defence case, it is still the duty of the defence to bring out his case during plaintiff's or prosecution's case. In fact this duty to disclose his defence during the prosecution's case is more relevant in criminal cases than in civil. This is particularly so when the plaintiff or prosecution's witness is relevant to the fact in issue. In criminal cases, prosecution does not know what the defence is going to be, except in alibi, until the defence adduced its evidence.* (Emphasis added.)

[22] Furthermore, even if we were prepared to excuse the said omission and consider the fact that the police report of PW6 alluded to a fight between the two, nonetheless the strict requirement of the law on that defence as pointed out earlier from the judgment of the learned JC must be complied with. Given its importance we would now reiterate and rephrase that requirement which must be satisfied by the defence in order to discharge the legal burden on its shoulders, and that is, that the fight must not only be sudden but there must not be any premeditation and that the act was committed in a heat of passion without the appellant taking undue advantage or acting in a cruel or unusual manner. This burden was obviously not discharged in this case for we agree with the learned JC that there was evidence of premeditation on the part of the appellant which was not disproved by his mere normal reaction when asking for the appellant's whereabouts from PW7 as highlighted earlier and neither by the evidence of DW2 which justifies his possession of the knife. We say this because the best and more reliable evidence in respect of the appellant's job scope would obviously come from PW6 but even if it was true that the appellant had previously use the knife to cut the grass, it does not mean that he never intended to use it as a weapon in this case. The reason we said so is because the appellant simply had no reason to look for the deceased that morning and doing so with the knife in his possession as admitted by him (at lines 1–2, p 194 of Vol 2 of the appeal record) given his seething anger and ill-feelings towards the deceased, justifies the conclusion that his act was a pre-meditated one.

[23] Furthermore, as per PW6's evidence, the appellant had indeed acted in a cruel manner for he had even continued his attack on the deceased after the latter fell on the ground. Thus, the physical fight between the appellant and the deceased may have developed suddenly as alleged by the appellant following the altercation between them and justifying the learned JC's finding that there was a sudden fight between the two but it was not a sudden fight in the legal sense of the words as envisage in the said Exception 4.

[24] For the reasons stated above, we have decided to affirm the decision of the learned JC and dismissed the appellant's appeal.

Appeal unanimously dismissed and trial court's decision affirmed.

Reported by Ashok Kumar